United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

30

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,106

UNITED STATES OF AMERICA,

v.

HORACE L. WYATT,
Appellant

On Appeal from the United States District Court
for the District of Columbia

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	(i)
TABLE OF AUTHORITIES	(ii)
STATEMENT OF ISSUES PRESENTED	(iii)
JURISDICTIONAL STATEMENT	1
REFERENCES TO RULINGS	1
STATEMENT OF CASE	2
FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED	3
SUMMARY OF ARGUMENT	4
I. The trial judge went beyond the limits of proper judicial participation in the trial by extensive questioning and cross-examination of the defense witnesses, which by developing weaknesses in testimony favorable to the defendant, and by leading the jury to infer that the trial judge did not believe the defense witnesses to be truthful, damaged the credibility of the defense witnesses and their testimony. Thus the defendant was denied a trial in an impartial court by an unprejudiced jury	5
II. The trial judge refused to include in his charge to the jury defendant's requested instruction which would have placed before the jury special facts which presented an evidentiary theory which if believed would defeat the factual theory of the prosecution	11
III. The trial judge's indication to the jury that "a loaded pistol is a dangerous weapon," in the absence of any evidence, when considered with the entire record must have had a prejudicial effect on the jury	13
CONCLUSION	14

TABLE OF AUTHORITIES

	Pages
FEDERAL RULES OF CRIMINAL PROCEDURE	
Rule 52(b)	10
CASES	
Blunt v. United States, 100 U.S. App. D.C. 266, 244 F. 2d 355 (1957)	13
Carroll v. United States, 326 F. 2d 72 (C.A. 9, 1963)	8
Cooper v. United States, 123 U.S. App. D.C. 83, 357 F. 2d 274 (1966)	13
*Gomila v. United States, 146 F. 2d 372 (C.A. 5, 1944)	5, 11
Greenfield v. United States, 119 U.S. App. D.C. 278, 341 F. 2d 411 (1964)	14
Hashfield v. State, 247 Ind. 95, 210 N.E. 2d 429 (1965)	14
*Hill v. United States, 332 F. 2d 105 (C.A. 7, 1964)	10
*Levine v. United States, 104 U.S. App. D.C. 281, 261 F. 2d 747 (1958)	11
Pronger v. United States, 287 F. 2d 498 (C.A. 7, 1961)	14
*Salley v. United States, 122 U.S. App. D.C. 359, 353 F. 2d 897 (1965)	11, 13
*State of New Jersey v. Christie, 91 N.J. Super. 420, 221 A. 2d 20 (1966)	6, 10
*United States v. Carmel, 267 F. 2d 345 (C.A. 7, 1959)	9

STATEMENT OF ISSUES PRESENTED *

1. Looking at the record as a whole, did the District Court err in unduly participating in the trial by active cross-examination of the appellant-defendant as well as of the other defense witness to the extent that the credibility of the defendant's witnesses was prejudicially affected in the eyes and ears of the jury where credibility was the key to a fair jury trial?

2. Did the District Court err in refusing to give the defendant's requested instruction to the jury as to identification by the prosecuting witness which covered the special facts of the case and instead gave a boiler plate type of instruction?

3. Again, looking at the record as a whole, did the District Court prejudice the right of the appellant to a fair jury trial by including the phrase "a loaded pistol is a dangerous weapon" in the charge to the jury, where there was no evidence in the case whatsoever of "a loaded pistol"?

* This case has not been before this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24106

UNITED STATES OF AMERICA,

v.

HORACE L. WYATT,

Appellant

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant Horace L. Wyatt appeals from a judgment of conviction entered by the United States District Court for the District of Columbia on April 17, 1969, after a jury trial held February 24-25, 1969. Appellant was indicted November 6, 1968, under Count One for robbery (22 DCC 2901) and under Count Two for assault with a dangerous weapon (22 DCC 502). He was found guilty as indicted. Appellant was sentenced on April 17, 1969, to five years to fifteen years.

On March 31, 1970, Appellant was authorized by the United States Court of Appeals to proceed on appeal without payment of costs. This Court has jurisdiction pursuant to 28 USC 1291.

REFERENCES TO RULINGS

None.

STATEMENT OF CASE

Mr. Armin Fellner, then manager of the Translux Theatre, reported that on August 17, 1968, two armed men forced him to open the safe in his office and robbed him of $764.00 belonging to the Translux Theatre, $97.00 of his own money and a wallet valued at $6.00. On September 7, 1968, Mr. Fellner saw the defendant at another theatre, identified him as one of the men who robbed and assaulted him, and called the police, who came and arrested the defendant.

When the case came to trial, the defense was one of alibi and mistaken identity. The prosecuting witness made a positive identification of the defendant (tr.* pp. 13-14), albeit he was in the presence of the two men who committed the offense for about three or four minutes (tr. p. 13). The other man has not been identified or apprehended. When the defense presented its case, both defendant and an alibi witness testified that defendant had been elsewhere at the time of the crime.

The defendant took the stand as the first witness in his defense. Almost immediately the trial court intervened and began asking questions about matters which were irrelevant (tr. 30-31). The court continued to question the defendant extensively (tr. 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 40, 41, 43, 44, 45, 46, 47) and

* All (tr.) references are to the Transcript of February 24, 1949, unless otherwise indicated.

later pointedly cross-examined the defendant's alibi witness (tr. 48, 50, 51, 52, 53).

Additionally, the trial court refused the Defendant's Request for Instruction (Identity) (Record 7), and in lieu thereof gave a simple boiler plate type of instruction (tr. p. 9, February 25, 1969).

Further, the trial court instructed the jury, in the absence of any evidence on the point, that "a loaded pistol is a dangerous weapon" (tr. p. 8, February 25, 1969).

The jury found the defendant guilty as charged. Defendant appeals from the judgment of conviction entered by the United States District Court for the District of Columbia.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. The District Court erred where it participated in the trial beyond the limits of the proper role of the court.
2. The District Court erred in refusing to instruct the jury as requested by the defendant's trial counsel involving the question of identity and in support of the evidentiary theory of the defendant (Record 7).

3. The District Court erred when it instructed the jury "a loaded pistol is a dangerous weapon" in the absence of evidence indicating a pistol had been used or that the gun used was loaded which when taken with the record as a whole must have resulted in prejudicing the jury on the principal issue before them.

SUMMARY OF ARGUMENT

I

The trial judge went beyond the limits of proper judicial participation in the trial by extensive questioning and cross-examination of the defense witnesses, which by developing weaknesses in testimony favorable to the defendant, and by leading the jury to infer that the trial judge did not believe the defense witnesses to be truthful, damaged the credibility of the defense witnesses and their testimony. Thus the defendant was denied a trial in an impartial court by an unprejudiced jury.

II

The trial judge refused to include in his charge to the jury defendant's requested instructions as to identity which would have placed before the jury special facts based upon the evidence and which presented an evidentiary approach which if believed by the jury would defeat the approach of the prosectuion.

III

The trial court's instruction to the jury that a "loaded pistol

is a dangerous weapon", in the absence of evidence, when considered with the record as a whole must have prejudiced the jury against defendant.

ARGUMENT

I

> The trial judge went beyond the limits of proper judicial participation in the trial by extensive questioning and cross-examination of the defense witnesses, which by developing weaknesses in testimony favorable to the defendant, and by leading the jury to infer that the trial judge did not believe the defense witnesses to be truthful, damaged the credibility of the defense witnesses and their testimony. Thus the defendant was denied a trial in an impartial court by an unprejudiced jury. *

Appellant realizes that the trial judge is not a mere umpire and has the right to participate in the trial, including the right to cross-examine witnesses in the furtherance of justice. However, such participation must not be so extensive that the impartiality of the court is destroyed, or that the jury is given the impression that the trial court doubts the veracity of the defendant or feels that the defendant is guilty. The trial judge should not take over the task of the United States Attorney. See Gomila v. United States,

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* With respect to I, Appellant desires the Court to read pages 27 through 58 of the transcript of February 24, 1969.

146 F. 2d 372, 374 (C. A. 5, 1944) and cases cited therein. Also see Carroll v. United States, 326 F. 2d 72 (C. A. 9, 1963).

If the court crosses the boundary of proper participation, and participates on the prosecution's side to the extent that the court appears to become the government's advocate, not only has the adversary system broken down, not only does the defense counsel find himself competing against both counsel for the prosecution and the court, but the jury is likely to be affected. When the court makes its questioning of the defendant and the defense witnesses overly extensive, it creates a situation in which the jury is likely to infer that the court believes the defendant and his witnesses are lying, which harms their credibility before the jury. See State of New Jersey v. Christie, 91 N. J. Super. 420, 424, 221 A. 2d 20, 22 (1966). In addition, excessive questioning by the court is likely to damage the defense witnesses' credibility by making them confused, by making them cautious rather than spontaneous witnesses, and by disrupting counsel's orderly presentation of the case.

In the trial of the present case, credibility was a key factor in the outcome of the trial, as the jury heard conflicting testimony from prosecution and defense witnesses. The main prosecution witness testified that the defendant was the man who committed the crime; the defense produced two witnesses who testified that the defendant was in a bar at the time the crime was committed.

When the jury is faced by such conflicting testimony, credibility determines the verdict, and any events in the course of the trial which could affect credibility should be viewed in that light.

Certainly the factors to damage the defense witnesses' credibility were present in the trial. The trial court asked, in one day, so many questions of the defense witnesses that the sheer volume of questions must have had an effect on the jury. Compared to only one question asked of the prosecution witnesses, the court asked the defendant in the neighborhood of forty-seven (47) questions during the direct examination, nine (9) during cross-examination, and seven (7) during redirect. When the defense's alibi witness was on the stand, the court asked nineteen (19) questions during direct examination, then allowed cross-examination to proceed uninterrupted.

While the record cannot report the trial judge's facial expressions or tone of voice while he was questioning the defendant, the wording of some of the questions and the repetitious character of some of the questions must have led the jury to feel that the trial judge doubted the veracity of the defendant.

In addition to the number of questions asked of defendant by the trial judge, some of the testimony was damaging to the defense witnesses' credibility. Some of this testimony involved matters quite irrelevant to the offenses for which the defendant was on trial. For instance, the court pressed the defendant to admit he had not

told the bail agency that he was unemployed (tr. 30-31). The court also developed testimony indicating the bail agency had had trouble over getting defendant's address (tr. 31). Thus, before the defense had been able to develop its case, the defendant had been demonstrated to be less than candid on at least one and perhaps two previous occasions -- obviously handicapping the defendant's credibility, and on matters that did not themselves have any bearing on the defendant's guilt or innocence.

The volume of the court's questions did come from matter relevant to the trial, but the court's questioning brought the defendant's credibility into doubt not only by raising in the minds of the jurors the impression that the court thought the defense witnesses were not truthful on these issues, but also by the fact that the court was on occasion able to develop weaknesses in the defendant's testimony, and often had the defendant confused and "scrambling" to explain himself. For instance, the court developed testimony that was internally inconsistent in that the defendant, in the course of a very few seconds, had named two different dates in August as the date he ceased to be employed by the University Club (tr. 34). Later in the trial, after the defendant had testified that he had a job on September 7, the court immediately attacked the testimony, and weakened it by developing testimony that the defendant did not know what hours he was supposed to work (tr. 45-46). The damage done

by the court's cross-examination in this instance sufficiently impressed defense counsel that he felt compelled to revise his presentation of the defense in midstream: while he had been finished with his planned re-direct examination (he said, "That is all," tr. 45, four lines from the bottom of the page), after the court's cross-examination counsel felt it necessary to extend the re-direct. However, the court still had the last word -- in fact, the court asked the last four questions of the re-direct (tr. 47).

The court also cross-examined the defense's alibi witness with a series of questions which could well have served to cast doubt on the witness' testimony and could have led the jury to conclude that the court did not believe the witness (tr. 50, 51), though admittedly such cross-examination would have been proper if it had been made by the prosecutor.

The participation by the court in the trial of the present case is similar to the participation by the trial court in United States v. Carmel, 267 F. 2d 345 (C. A. 7, 1959) in which the court reversed the conviction. In Carmel, as in the present case, the court conducted extensive cross-examination fo witnesses, including cross-examination which made the defendant scramble to explain himself (p. 347-8), questions which could cast doubt on the witness' truthfulness (p. 348, 349) and questions which could cast doubt on testimony favorable to the defendant (p. 349). The opinion provides various portions of the record of the Carmel trial which may be

compared to the events in the transcript of the trial in the case at bar.

Another case which quotes portions of the record showing participation by a trial court similar to the participation by the court in the court below is State of New Jersey v. Christie, supra. In that case the upper court quotes three instances of the trial judge asking questions of defendant's alibi witness, and finds that these three instances could prejudice the jury.

A third similar case is Hill v. United States, 332 F. 2d 105 (C. A. 7, 1964). While the opinion does not quote any portions of the record, the court there found that where thirty-five questions had been asked of the defendant as against two questions asked of the government's witnesses, and a number of the questions could lead to the jury's receiving the impression that the defendant's truthfulness was doubtful, there was error. In the trial of the present case, the trial court asked in the neighborhood of eighty-two questions of defense witnesses compared to only one of the government's witnesses, and appellant contends that a number of the questions could lead the jury to the impression that the court doubted defendant's truthfulness.

While counsel for the defendant did not raise objection to the court's participation in the trial, it is submitted that where errors are apparent on the face of the record and such do serious injury, the appellate courts have a duty to correct the errors, despite the fact that there was no objection by trial counsel. Rule 52(b) FRCP;

also see Gomila v. United States, supra, 146 F.2d at 376.

II

> The trial judge refused to include in his charge to the jury defendant's requested instruction which would have placed before the jury special facts which presented an evidentiary theory which if believed would defeat the factual theory of the prosecution. *

It is reversible error for the court to refuse to instruct on the defendant's theory of the case, including to refuse to instruct on situations in which particular facts present an evidentiary theory which if accepted by the jury would defeat the factual theory of the prosecution. Levine v. United States, 104 U. S. App. D. C. 281, 282, 261 F. 2d 747, 748 (1958).

The Levine holding was reiterated in Salley v. United States, 122 U. S. App. D. C. 359, 353 F. 2d 897 (1965), in which the trial court had refused to give the defendant's requested instructions and gave only a boiler plate instruction. The appellate court found that while the trial judge need not give the exact wording of the defendant's requested charge, the instruction given had to meet the Levine test.

In the present case, the defendant requested the court to give instructions on the identification issue which would have brought to

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With respect to II, Appellant desires the Court to read (R. 7) Defendant's Request for Instruction, page 9 of the Charge to the Jury, (tr. of February 25, 1969), and pages 13-14 and 16-20 of the Transcript of February 24, 1969.

the jury's attention special facts which might have led the jury to accept defendant's theory that the circumstances surrounding the complaining witness' identification of defendant were not conducive to an accurate identification and that his identification should be accordingly discounted. (R. 7).

The special facts that support the defendant's theory were for factor (a) of the requested instructions: that the witness had been in contact with the culprits for only three or four minutes (tr. 13), that he had his back to them during much of that time (tr. 17-19), that he did not remember what they were wearing (tr. 16), that he did remember which one had frisked him for weapons (tr. 18); for factor (b) that the witness had never seen either of the robbers before the crime (tr. 13); for factor (c) that the witness referred to his report to the police as probably containing information he could not remember; and for factor (d) the fact that three or four weeks elapsed between the robbery and the witness' identification of the defendant. The trial judge did not grant defendant's requested instructions and instead gave an instruction (page 9 of the charge) which ignored the special facts surrounding the identification -- an identification made by the only government witness who testified -- that defendant was the one who committed the crime.

The court's refusal to give the requested instruction meant the jury went to its deliberations with only a general boiler plate instruction, and it can only be speculated whether the jurors happened

to consider defendant's evidentiary theory. Appellant submits that such approach by the trial judge is contrary to Salley v. United States, supra, at 122 U.S. App. D.C. 361, 353 F. 2d 899.

Inasmuch as the requested instruction in the Salley case only referred to general facts and circumstances which could raise a reasonable doubt as to proper identification, while the requested instruction in the present case listed specific facts and circumstances which could have raised a reasonable doubt as to proper identification, refusal of the requested instruction in the case at bar presents a stronger case for reversal than did the refusal of the requested instruction in the Salley case.

III

> The trial judge's indication to the jury that "a loaded pistol is a dangerous weapon," in the absence of any evidence, when considered with the entire record must have had a prejudicial effect on the jury. *

Even unwittingly, a trial judge may not distort or add to the evidence. Blunt v. United States, 100 U.S. App. D.C. 266, 276, 244 F. 2d 355, 365 (1957); Cooper v. United States, 123 U.S. App. D. C. 83, 86, 357 F. 2d 274, 277 (1966). In the case at bar, in the learned trial court's charge he told the jury, "This count is assault

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* With respect to III, Appellant desires the Court to read page 8 of the Charge to the Jury and pages 11 and 18 of the transcript.

with a dangerous weapon, and a loaded pistol is a dangerous weapon" (p. 8 of the charge), despite the absence of any evidence that any of the guns used in the crime were loaded, or that any gun used was a pistol. The above-quoted portion of the charge also assumed the use of a deadly weapon, which is improper. Greenfield v. United States, 119 U.S. App. D.C. 278, 280, 341 F. 2d 411, 413 (1964). That portion of the instruction was apt to confuse and prejudice the jury, and an instruction which is likely to confuse the jury should not be given. Pronger v. United States, 287 F. 2d 498, 500 (C.A. 7, 1961), Hashfield v. State, 247 Ind. 95, 210 N.E. 2d 429 (1965).

CONCLUSION

On all accounts therefore, Appellant respectfully submits that the judgment should be reversed and the case remanded for a new trial.

The judgment appealed from should be reversed.

Respectfully submitted,

Milton I. Baldinger
Counsel appointed by this Court

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,196

HORACE L. WYATT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
DAVID T. ANDERSON,
JOHN R. DUGAN,
Assistant United States Attorneys.

INDEX

	Page
Counterstatement of the Case	1
The Government's Case	2
The Defense Case	3
Argument:	
I. The trial court did not go beyond the limits of judicial participation in its examination of the defense witnesses so as to indicate to the jury its belief in appellant's guilt	4
II. The trial court's instructions to the jury were proper and sufficiently covered appellant's requested instruction on identity	7
III. It was not erroneous or prejudicial to appellant for the trial judge to state in his instructions to the jury that "a loaded pistol is a dangerous weapon" when there was no evidence that the pistols used in the robbery were loaded	10
Conclusion	11

TABLE OF CASES

Billeci v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950)	7
Griffin v. *United States*, 83 U.S. App. D.C. 20, 164 F.2d 903, *cert. denied*, 333 U.S. 857 (1948)	4
Jackson v. *United States*, 117 U.S. App. D.C. 325, 329 F.2d 893 (1964)	4
Jones v. *United States*, 124 U.S. App. D.C. 88, 361 F.2d 537 (1966)	9
Kelly v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966)	10
Levine v. *United States*, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958)	9
Salley v. *United States*, 122 U.S. App. D.C. 359, 353 F.2d 897 (1965)	9
Thompson v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951)	9
United States v. *Baker*, D.C. Cir. No. 23,082, decided May 12, 1970	11
United States v. *Barbour*, —— U.S. App. D.C. ——, 420 F.2d 1319 (1969)	4
United States v. *Curtis*, D.C. Cir. No. 22,470, decided May 19, 1970 (*en banc*)	11

Cases—Continued	Page
United States v. *Gantt*, D.C. Cir. No. 22,832, decided May 12, 1970	11
**United States* v. *Green*, D.C. Cir. No. 23,156, decided June 17, 1970	4, 7, 9
Villaroman v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950)	11
Vinci v. *United States*, 81 U.S. App. D.C. 386, 159 F.2d 777 (1947)	7
Wigfall v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956)	9

OTHER REFERENCES

22 D.C. Code § 502	1
22 D.C. Code § 2901	1
Rule 30, FED. R. CRIM. P.	10
Rule 52(b), FED. R. CRIM. P.	4

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Did the trial court commit error in its examination of the defense witnesses?

II. Did the trial court's instructions to the jury adequately cover appellant's theory of the case?

III. Did the trial court err when it stated to the jury that "a loaded pistol is a dangerous weapon" when there was no evidence that the pistols used in the robbery were loaded?

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* This case has not been previously before the court except in Misc. No. 3427, in which this Court on March 31, 1970, granted appellant leave to prosecute the appeal without prepayment of costs.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,106

HORACE L. WYATT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed November 6, 1968, appellant was charged with robbery (22 D.C. Code § 2901) and assault with a dangerous weapon (22 D.C. Code § 502) in connection with events which occurred on August 17, 1968. Following a jury trial before the Honorable Edward M. Curran on February 24 and 25, 1969, appellant was found guilty as indicted. On April 17, 1969, appellant was sentenced to concurrent terms of imprisonment of five to fifteen years. This appeal followed.

The Government's Case

The factual picture of the robbery and assault was drawn solely by the testimony of Armin Feller, the manager of the Trans-Lux Theatre, 736 14th Street, Northwest. Feller testified that around 1:00 a.m. on August 17, 1968, he was in his office which was located in the downstairs area of the movie theatre. Routinely Feller would leave his office moments before the movie feature ended and would meet one of the ushers in the lobby of the theatre (Tr. 11, 13). At 1:12 a.m., Feller testified, he left his office, and as he proceeded through a door leading to a hallway, appellant and another man "rushed at [Feller] and forced [him] back" into the office (Tr. 16). Feller's back was turned to the men for a few moments while he unlocked the office door, but once inside he was "face to face" with them (Tr. 18). Both men were armed. The weapons were placed against Feller's body while the two men conducted a search and "frisked" Feller for weapons (Tr. 18). The men asked Feller for the money, and he explained it was in the safe. Feller was forced to open the safe and turn over $764 (Tr. 12, 19). In addition Feller's wallet containing $97 was taken, and Feller was tied up and compelled to lie on the floor (Tr. 12). During the robbery a buzzer rang which alarmed the two men. Feller explained to them that an usher expected him upstairs; one robber then said to the other, "We had better get out of here," and they left. The men were in Feller's presence for about three or four minutes (Tr. 13). The robbery was reported to the police.

Three weeks later, on September 7, 1968, Feller had an occasion to visit another movie theatre, the Playhouse Theatre at 727 15th Street, Northwest, where he spotted appellant inside the theatre talking to the assistant manager (Tr. 14). Feller pretended not to recognize appellant. Appellant shortly thereafter excused himself and left the theatre, whereupon, Feller called the police (Tr. 18). The police arrived about three minutes later and

arrested appellant in a building next to the theatre (Tr. 15).

Detective Robert J. Morocco of the Metropolitan Police testified that he spoke with Feller on September 7, 1968, at the Playhouse Theatre and that as a result of the conversation he searched for appellant. Appellant was seen a short distance from the theatre inside the lobby of an office building and was placed under arrest (Tr. 23-24).

The Defense Case

Appellant's defense was one of alibi. Testifying on his own behalf, appellant stated he was in "Joe's Beer Joint on O Street" in the evening of August 16 and 17, 1968 (Tr. 29). As was his custom, appellant would finish work at the University Club around 3:00 p.m. and go to this bar almost every day of the week except Sundays (Tr. 30, 35-41).

Appellant's employment at the University Club became the subject of some confusion at trial because of his various explanations of when he was laid off from work (Tr. 28-32, 34-35, 44-46). However, appellant maintained he left work on Friday, August 16, and stayed in the bar until the place closed around 2:00 a.m. (Tr. 36-37, 40). The crime was committed around 1:00 a.m.

With respect to appellant's arrest on September 7, 1968, he stated that his mother received a call for a job from a downtown theatre and that appellant just stopped by the Playhouse Theatre to inquire about employment. Appellant picked the Playhouse Theatre because it was the nearest one to his house (Tr. 47). According to appellant, he was arrested outside of the theatre and not, as was previously stated, in the office building lobby (Tr. 43).

Joseph McKelvey Miller, the owner of "Joe's Bar," or as it was formally called the New Jersey Bar and Grill, 401 O Street, Northwest, testified he knew appellant as a customer in his bar. According to Miller, appellant would frequent his place about twice a week, Wednesday

and Friday nights (Tr. 49). On August 16, 1968, Miller remembered, appellant came into the bar with a young lady and left a "little before or after 2:00 [a.m.]" on August 17 (Tr. 52-53). It was learned on cross-examination that Miller first heard about appellant's arrest for this charge about two weeks before the trial. On that occasion appellant's mother came into Miller's bar and asked him about August 16 and 17, 1968. Miller told her he "needed a little time to think it over to see whether [he] did or [did] not" remember if appellant was in his establishment (Tr. 58).

ARGUMENT

I. The trial court did not go beyond the limits of judicial participation in its examination of the defense witnesses so as to indicate to the jury its belief in appellant's guilt.

(Tr. 28-53)

Appellant's principal claim on this appeal is that the "sheer volume of questions" propounded by the District Court must have had the effect of conveying to the jury its doubt as to appellant's veracity (Appellant's Brief p. 7). We read the record differently and maintain that the trial court's questions were entirely proper and were asked solely to assist the jury and clarify the issues. Further, we note that appellant made no objection at trial, and we submit that appellant has failed to make an adequate showing of plain error to constitute grounds for reversal. Rule 52(b), FED. R. CRIM. P.

"[F]ew rules are better settled . . . than the right of a trial judge to make proper inquiry of any witness when he deems that the ends of justice may be served thereby and for the purpose of making the case clear to the jurors." *Griffin* v. *United States*, 83 U.S. App. D.C. 20, 21, 164 F.2d 903, 904, *cert. denied*, 333 U.S. 857 (1948).[1]

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[1] See *United States* v. *Green*, D.C. Cir. No. 23,156, decided June 17, 1970; *United States* v. *Barbour*, —— U.S. App. D.C. ——, 420 F.2d 1319 (1969); *Jackson* v. *United States*, 117 U.S. App. D.C. 325, 329 F.2d 893 (1964).

The question becomes what then is "proper inquiry" by the trial judge in a particular case. In this area of the law, more so than in others, each case is unique. Appellate courts have properly considered the context of the trial court's inquiry in light of the entire record. It is from this perspective that we maintain that a qualitative analysis of the judicial inquiries for prejudice to an appellant is far more important than the quantitative approach suggested by appellant in this case.

Early in appellant's testimony it was apparent that he had some difficulty in answering questions, either because he did not understand them or because he wanted the jury to hear certain answers irrespective of the questions. For example, appellant was asked if he was working in August 1968, and he responded, "I was sick" (Tr. 28). Moments later the court inquired when he left his employment at the University Club; appellant responded, "About August 25th because I had yellow jaundice" (Tr. 28). Focusing on the particular day of the robbery, the court asked if appellant worked on August 17, 1968. He replied, "I was working on dishwashing and I was taken sick . . . . I was working off and on" (Tr. 28). Defense counsel continued his direct examination of appellant on his alibi defense, but the court interrupted to clear up appellant's work record at the University Club (Tr. 30-32). Subsequently, the attorney returned the line of questions to appellant's employment status, and it was on this occasion that appellant gave two additional separation dates from the University Club, *i.e.*, August 3 and August 19, 1968 (Tr. 34) (see Appellant's Brief, p. 8).

Dealing specifically with the alibi defense, it was the trial court's questions which narrowed the discussion to the relevant dates in contrast to the vague questions posed by appellant's attorney regarding his frequenting Joe's Bar. For example, the trial judge learned upon inquiry that appellant was in the bar on the night of the robbery (Tr. 35-36). Immediately after this series of questions the defense attorney asked, "Did you go to Joe's [Bar] on Sundays? . . . Did you ever go there on

Saturdays?" (Tr. 36). With these types of questions put to appellant, it was obvious to the experienced trial judge that the only material dates for jury consideration were August 16 and 17. Therefore the court asked another series of questions regarding the pertinent times to assist the jury (Tr. 37-39). Nevertheless, appellant's attorney continued to establish totally irrelevant details as to appellant's history of attendance at Joe's Bar, asking him such questions as the following: "[I]n the course of let's say six months before August of this year, can you just give us an estimate of about how many times you have been in Joe's Bar?" (Tr. 39).[2] Quantitatively the court may have asked a number of questions, but we submit that the court had the obligation to clarify the issues and that its questions in no way revealed disbelief in appellant's responses.

Appellant's trial attorney did not develop on direct examination appellant's version of his arrest. The prosecution inquired as to how it was that appellant happened to be at the Playhouse Theatre. Appellant explained that his mother received a phone call from a manager of a movie theatre regarding a job (Tr. 42). A bench conference was then held, and as a result of that discussion it was unclear exactly why appellant went to this particular theatre and who in fact called appellant's mother. The court immediately thereafter questioned appellant but did not fully clear up the confusion as to why appellant stopped at the Playhouse Theatre (Tr. 43-44). On redirect examination appellant stated that the reason he stopped at this theatre was that it was the closest one to his home (Tr. 46-47).

We maintain that appellant cannot just add up the number of questions which the trial judge asked and then conclude he was thereby prejudiced. The court's partici-

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[2] We would further point out that the court's questions directed to the other defense witness, Mr. Miller, were also primarily concerned with the relevant dates of August 16 and 17 (Tr. 50-51, 53). The defense attorney, however, again largely concentrated his questions on appellant's use of the bar (Tr. 48-54).

pation was clearly in search of the truth and was intended to guide both counsel and the jury in developing and clarifying the essential facts. Appellant has not established that he was prejudiced by the court's questions. He argues that the court's "facial expression or tone of voice" and the "wording of some of the questions" must have led the jury to feel the judge doubted appellant's veracity (Appellant's Brief, p. 7). This argument, however, ignores the duty of a defense counsel to make these matters a part of the record. *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950); *Vinci* v. *United States*, 81 U.S. App. D.C. 386, 159 F.2d 777 (1947). Moreover, trial counsel had an opportunity during the course of the trial to object to the court's questions but failed to do so. As this Court has recently noted, "any prejudicial effect from the trial court's participation would have come not from any single question, but from continued participation apparently on the side of the prosecution. Accordingly, there was ample time to object before serious harm was done. With no objection made at trial, the present record does not warrant reversal." *United States* v. *Green*, *supra*, slip op. at 10. What was true in *Green* is equally true here.

II. The trial court's instructions to the jury were proper and sufficiently covered appellant's requested instruction on identity.

(1 Tr. 3, 9-10)

Appellant contends the trial judge committed reversible error by refusing to instruct on appellant's theory of the case. We disagree for four reasons.

First, the record is not clear when the trial judge considered appellant's requested instruction.[3] The docket en-

[3] Appellant's requested instruction was as follows:

> The defense in this case is that the defendant Wyatt is not the person who committed the crime charged in the indictment. The identity of the defendant Wyatt as one of the men who

tries of the courtroom clerk indicate that the requested instruction was denied, but our reading of the record does not disclose the point in the trial at which the court so ruled. All the evidence was in by early afternoon of February 24, 1969, and the instructions were not given to the jury until the following morning. After the instructions were completed, appellant was given an opportunity to object or to add any instructions, but he declined to do so (1 Tr. 10).[4]

Second, even if the record was sufficiently clear as to the timeliness of appellant's request, the instruction as framed would have been improper. In part it suggested

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committed the crime is, of course, an essential element of the government's case. Therefore, the burden is on the government to prove beyond a reasonable doubt not only that the crime alleged was committed, but also that it was the defendant Wyatt who committed it. In this connection, the government has called one witness who has testified that the defendant committed the crime. No evidence of any other type or kind has been presented in this case tending to prove that the defendant was involved in the offense. In other words, the government seeks to prove the identity of the defendant as the perpetrator of the crime by testimonial assertion. However, upon consideration of this testimony, you must be satisfied beyond a reasonable doubt of the accuracy of the witness's identification of the defendant.

In passing upon this evidence you should consider some of the following factors: (a) the witness's perception of the perpetrator at the time of the offense and the witness's recollection at the trial about the person; (b) whether the witness did or did not know or had seen the defendant before the time of the offense; (c) the witness's recollections of the description of the perpetrators which he had given to the police; (d) the length of time which elapsed between the commission of the offense and the time the witness made his identification of the defendant.

You are further instructed that it is not necessary for the defendant to prove that another person or persons committed the crime nor is the burden on the defendant to prove his innocence. If facts and circumstances have been introduced into evidence which raise a reasonable doubt as to whether the defendant was one of the two men who committed the crime charged, then you should find the defendant not guilty.

[4] Appellee will refer to the second transcript dealing with the charge to the jury on February 25, 1969, as "1 Tr."

that the Government could not establish a robbery case based solely on the uncorroborated testimony of one witness. That clearly is not the law. *Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). In addition, the instruction emphasized only factors which would negate an accurate identification. An instruction which amounted to a one-sided summary of the evidence would clearly not be proper. *United States* v. *Green, supra*, slip op. at 6.

Third, this case is unlike *Salley* v. *United States*, 122 U.S. App. D.C. 359, 353 F.2d 897 (1965), where the court expressed its concern over the chance of misidentification in cases involving undercover police officers in narcotics cases. In the case at bar the Government's sole witness had three to four minutes at the point of a gun to fix in his mind a picture of appellant's face. This picture is not something one would tend to forget easily, as may be the case when an undercover agent seeks to arrest 100 people he has dealt with separately over a period of months. *Salley* v. *United States, supra*. Moreover, the *Salley* case has expressly been limited by this Court to identifications in multiple unrelated narcotics purchase cases. *Jones* v. *United States, supra*.

Fourth and finally, the trial court's instruction fully covered the defendant's theory of the case. *Levine* v. *United States*, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958). The defense was one of alibi and mistaken identity. The court repeatedly emphasized in its charge that the Government had the burden to prove beyond a reasonable doubt that appellant was the person who committed the robbery, and that the Government's witness' identification was accurate.[5] In addition, the charge given by

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[5] The court instructed the jury thus (1 Tr. 9-10):

> Ladies and gentlemen of the jury, the defense in this case is one of alibi. You are, therefore, instructed that the burden is on the Government to prove beyond a reasonable doubt not only that the offense was committed as alleged in the indict-

the court also contained a sentence very similar to the last paragraph of appellant's requested instruction: "The law does not impose on the defendant the burden of proving his innocence or to put on evidence in the case to the contrary." (1 Tr. 3.) Nothing more was required.

III. It was not erroneous or prejudicial to appellant for the trial judge to state in his instructions to the jury that "a loaded pistol is a dangerous weapon" when there was no evidence that the pistols used in the robbery were loaded.

(1 Tr. 8-10)

Appellant failed to object to the trial court's instruction concerning assault with a dangerous weapon (1 Tr. 10). Application of Rule 30, FED. R. CRIM. P., should preclude appellant from now being heard on his untimely exception to the court's charges. Absent a showing of plain error affecting substantial rights, he cannot now obtain reversal. See, *e.g.*, *Kelly* v. *United States*, 124 U.S.

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ment, but, also, that this is the person who committed the offense, the alleged crime.

In other words, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you have a reasonable doubt as to the accuracy of the identification, then you must return a verdict of not guilty.

Evidence has been introduced that the defendant was not present at the time when and the place where these offenses were allegedly committed. The claim of alibi is a legitimate defense.

The defendant may not be convicted of the offenses with which he is charged unless the Government proves beyond a reasonable doubt that this defendant was present at the time when and the place where the offenses were committed.

If after a full and fair consideration of all the facts and circumstances, the evidence, you find that the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time when and the place where the offenses allegedly occurred, you must find him not guilty.

This is a case, ladies and gentlemen of the jury, where you must decide who you are to believe. And you should consider the evidence carefully and analyze the facts just as you would in the everyday affairs of your own life. If you do that, you will reach a considered judgment. (1 Tr. 9-10)

App. D.C. 44, 361 F.2d 61 (1966); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

The Goverment's principal witness testified that the two men who robbed him had guns and "each one had a gun against my body" (Tr. 18). There was no independent evidence showing that the unrecovered guns were loaded or unloaded. However, in its instructions the court stated, "This count is assault with a dangerous weapon, and a loaded pistol is a dangerous weapon." (1 Tr. 8). Appellant complains that the court added to the evidence to his detriment.

In light of this Court's recent opinion in *United States* v. *Curtis*, D.C. Cir. No. 22,470, decided May 19, 1970 (*en banc*), slip op. at 6, we respectfully submit appellant's argument is without merit. See also *United States* v. *Baker*, D.C. Cir. No. 23,082, decided May 12, 1970; *United States* v. *Gantt*, D.C. Cir. No. 22,832, decided May 12, 1970.[4]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[4] The *Baker* and *Gantt* cases were affirmed *per curiam* without opinion, but both cases presented the question of whether an unloaded firearm was a dangerous weapon. The evidence in *Baker* affirmatively showed that the weapon, a pistol, was unloaded; the weapon in *Gantt*, a sawed-off shotgun, was also unloaded, although the defendant had a quantity of live ammunition in his pocket when arrested moments after the offense.

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